UNITED
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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 665

Cases No. 717: GONZALEZ DE GERMAN
No. 718: MARAIS
No. 719: PURCELL
No. 720: COUDERC

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Hubert Thierry; Mr. Mayer Gabay;

Whereas at the request of Norma Gonzalez de German, Suzanne Marais, Janine Purcell and Janine Couderc, participants in the United Nations Joint Staff Pension Fund (hereinafter referred to as UNJSPF), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal to 15 March 1993;

Whereas, on 12 March 1993, the Applicants filed applications requesting the Tribunal, inter alia:

"...

3. To order the rescission of the decision taken by the Standing Committee on behalf of the Joint Staff Pension Board at its 174th meeting, held on 2 July 1992 at Montreal, to uphold the decision of the Secretary of the Board to calculate the pension payable to the Applicant, [as well as the contributions payable by them] by taking into account, for the [years 1990 and 1991], pensionable remuneration scales which do not correspond to the gross salary scales, and to draw all legal consequences from that rescission;

4. To award the Applicant, as costs, a sum payable by the Respondent, assessed at the time of the filing of this application at eighteen thousand (18,000) French francs, subject to adjustment upon completion of the proceedings."

Whereas the Respondent filed his answer on 29 April 1994;

Whereas, on 6 October 1994, the Applicants submitted written observations;

Whereas, on 13 October 1994, the presiding member of the panel ruled that no oral proceedings would be held in the cases;

Whereas, on 13 October 1994, the Tribunal put questions to the Respondent to which he provided an answer on 14 October 1994;

Whereas, on 18 October 1994, the Applicants provided their comments on the Respondent's submissions and he submitted an additional statement on 19 October 1994;

Whereas, on 21 October 1994, the Applicants provided their comments on the Respondent's additional statement;

Whereas the facts in the cases are as follows:

The Applicants Norma Gonzalez de German and Janine Purcell serve at UNESCO Headquarters in Paris as General Service staff members. Both are participants in the UNJSPF since 1972 and 1964, respectively. The Applicants Janine Couderc and Suzanne Marais, also participants in the UNJSPF, served at UNESCO Headquarters in the General Service category from 1968 until 1991 and from 1960 until 1994, respectively, when they separated from service. Both are now the recipients of retirement benefits from the Pension Fund.

On 16 April 1991, the Secretary of the UN Joint Staff Pension Board (UNJSPB) provided the Applicant Couderc with details of her benefit entitlements. In response to her subsequent request of 11 July 1991, the Secretary of the UNJSPB, on 22 October 1991, sent her an explanation of how her early retirement benefit had been calculated, in accordance with the UNJSPF's Regulations and Rules.

On 14 October 1991, the Applicant Gonzalez de German wrote to the Secretary of the UNJSPB pointing out that according to her

annual statement received from the UNJSPF, since 1 January 1990 her pensionable remuneration had been calculated as set forth in Annex II of UNESCO administrative circular No. 1700, i.e. grossing up, through the application of staff assessment rates, 95.5 per cent of the net salary, and thereby excluding a 4.5 per cent non-pensionable component incorporated in the net salary scale. The Applicant contested the pensionable remuneration amounts and consequent pension contribution levels reported by UNESCO on her behalf for the year 1990. The Applicant requested a review of the decision to calculate her pensionable remuneration based on Annex II, claiming that the calculation should have been based on the scales in Annex I of circular No. 1700, which were described as annual salary scales - expressed in gross and net amounts. The Applicant made the same claim for 1991, on the basis of the scales in Annex I of UNESCO administrative circular No. 1752. The Applicants Couderc, Marais and Purcell made similar claims and requests.

Administrative circular No. 1700, dated 12 January 1990 and entitled "Salaries and Benefits for General Service Staff at Headquarters", reported on the recommendations of the International Civil Service Commission (ICSC), following a survey of conditions of employment in Paris. The circular included an explanation in paragraph 5 as follows:

> "The benefits and allowances accorded by employers in Paris and considered by them as non-pensionable, on the basis of the survey, constitute 14.5 per cent of net remuneration. The ICSC considered the level of these benefits to be sufficiently high to recommend the establishment of a non-pensionable component of salary equivalent to 4.5 per cent of net salary at each grade and step."

The circular also explained, in paragraph 13, the distinction between Annex I and Annex II as follows:

> "In the light of the foregoing, the new scale set forth in Annex I will be applied to staff in the General Service category, with effect from 1 January 1990. The reference scale of October 1988 has been updated to take into account

> the evolution of external salaries between October 1988 and October 1989, applying the method used to adjust salaries between the surveys (...). This adjustment of 3.71 per cent is pensionable. The exchange rate used to gross up net salaries and to calculate pensionable remuneration (Annex II) is 6.09 Francs to the dollar, representing the average rate over the preceeding 36 months."

On 10 February 1992, UNESCO issued administrative circulars Nos. 1827 and 1828, in order to dispel certain "misunderstandings" that had arisen with respect to the different remuneration scales in the annexes of its earlier administrative circulars Nos. 1700 and 1752, by clarifying that the amounts set forth in Annex II of circulars Nos. 1700 and 1752 constituted gross salary for pension purposes.

On 2 July 1992, the Standing Committee of the UNJSPB upheld the decision of the Secretary of the UNJSPB concerning the calculation of the Applicants' pensionable remuneration and consequent contribution levels for the years 1990 and 1991. On 16 and 25 September 1992, the Secretary of the UNJSPB informed the Applicants in similar communications that the Standing Committee had decided:

> "(a) To acknowledge receipt of your request for review, concerning the levels of your pensionable remuneration and pension contributions for [the years 1990 and 1991];
>
> (b) To affirm that your appeal involved complex legal issues that were important and merited adjudication by the United Nations Administrative Tribunal; and
>
> (c) To uphold the acceptance by the Secretary of the Board of the levels of pensionable remuneration and pension contributions reported by UNESCO on your behalf for [the years 1990 and 1991]."

On 15 March 1993, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. Article 54(a) of the UNJSPF Regulations provides that pensionable remuneration is to be determined on the basis of the gross salary of the participant.

2. The UNJSPF should not have accepted any report from UNESCO of pensionable remuneration levels and of pension contributions that were based on scales other than the gross salary scales issued by UNESCO.

Whereas the Respondent's principal contentions are:

1. Within the UN common system, decisions as to the general methodology to be followed in General Service salary surveys and recommendations regarding the salary scale, determined on the basis of salary surveys at particular locations, are delegated to the ICSC which determined that the non-pensionable component in net salaries (here 4.5 per cent) cannot be included in the calculation of pensionable remuneration.

2. Although the listing of two distinct gross salary scales in UNESCO's administrative circulars Nos. 1700 and 1752, applicable to its General Service staff in Paris for the years 1990 and 1991, may have caused some lack of clarity, the intent was clear: to provide greater transparency in a rather complicated area, in the interest of all UNESCO staff members.

The Tribunal, having deliberated from 11 October to 4 November 1994, now pronounces the following judgement:

I. The Applicants appeal from the decision dated 2 July 1992, by the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB), to uphold the decision of the Secretary of the UNJSPB to calculate the pensions payable to the Applicants by taking into account, for 1990 and 1991, certain pensionable remuneration scales. The position of the Applicants is that, in so doing, the UNJSPB acted unlawfully because the scales did not correspond to the

gross salary scales established for the Applicants. The Applicants' position is based on article 54(a) of the Regulations of the United Nations Joint Staff Pension Fund which provides in part:

> "Pensionable remuneration shall be the equivalent in dollars of the sum of:
>
> (i) the participant's gross salary,
>
> (ii) any language allowance payable to him ..."

The Applicants state that their pensions with respect to the period in question were calculated incorrectly because they were based on a pensionable remuneration scale not termed "gross salary" as such, which differed from the amount described as "gross salary" in Annex I of UNESCO administrative circular No. 1700, dated 12 January 1990 and Annex I to UNESCO administrative circular No. 1752, dated 23 January 1991, with respect to the General Service category.

As the applications present common issues of law and fact, the Tribunal joins them.

II. Although the parties' submissions include a discussion of abstract questions regarding the relationship between the jurisdiction of the Tribunal and the ILOAT, there is agreement as to the Tribunal's competence in this case and accordingly, there is no need for the Tribunal to consider jurisdictional questions.

III. It is undisputed that the calculation of the Applicants' pensions was not based on the figures in Annex I to the administrative circulars, which was entitled "ANNUAL SALARY SCALE Showing Gross and Net Amounts After Application of Staff Assessment." The pensions were, however, derived using those figures and other calculations, on the basis of Annex II to the relevant circulars, which was entitled "PENSIONABLE REMUNERATION

Scale Expressed in French Francs the Equivalent of Which in Dollars Is Pensionable for General Service Category Staff Members at Headquarters."

IV. The difference between the two Annexes to the administrative circulars is explained in the body of circular No. 1700, and the explanation was obviously applicable also to circular No. 1752. The difference stems from a recommendation by the International Civil Service Commission (ICSC) with regard to remuneration levels of the General Service category. The ICSC recommendation involved a revision of its salary survey methodology applicable to Headquarters locations so as to identify a non-pensionable element in the net salary payable at Headquarters locations. Prior to this revision, there had been a substantial number of duty stations, other than Headquarters locations, where a non-pensionable component had been identified and taken into account in the process of arriving at gross salary scales to establish appropriate pensionable remuneration scales. UNESCO administrative circulars Nos. 1700 and 1752 represented the first UNESCO application of the ICSC recommendation regarding this matter. In essence, the ICSC had found that the applicable area salary levels used as comparators in arriving at its recommended General Service category levels incorporated an amount that was non-pensionable. The ICSC concluded that General Service category levels should follow a similar pattern.

V. Although the pertinent ICSC survey had identified a non-pensionable element in area salaries of 14.5 per cent, it recommended that only 4.5 per cent be considered as non-pensionable remuneration for the General Service category at the Paris Headquarters locations. The implementation of this recommendation was calculated by arriving at a gross salary figure for staff assessment and salary payment purposes by "grossing up" the net salary found in the ICSC salary survey in accordance with the standard ICSC procedure for so doing. This gross salary figure was

then reduced by the amount of staff assessment, and the resulting net figure was then multiplied by 95.5 per cent. This calculation produced a net salary figure from which the 4.5 per cent non-pensionable component had been removed. To arrive at the gross salary figure for pensionable remuneration purposes, the net figure was "grossed up" in accordance with the same ICSC procedure.

VI. In effect, the implementation of the ICSC recommendation involved the use of two "gross salary" figures, one for the purpose of determining the salary payable to a staff member and the other for the purpose of calculating contributions to the Pension Fund and benefits payable by it. The 4.5 per cent non-pensionable remuneration element is reflected in the gross salary calculations displayed in Annex II, but not in the gross salary scales displayed in Annex I. However, given the explanations in paragraphs 5 and 13 of circular No. 1700, a reasonable person reading the administrative circulars would understand that Annexes I and II had to be read together in order to determine the gross salary figure for pensionable remuneration purposes within the meaning of article 54(a) of the Pension Fund Regulations.

VII. In developing the two Annexes attached to the administrative circulars, UNESCO was attempting to explain in a reasonably understandable fashion its salary and pensionable remuneration methodology and structure. As a non-pensionable element was present for the first time in the net salary payable to the General Service category at UNESCO's Paris Headquarters, it is not surprising that UNESCO made a special effort to ensure that staff members would see the difference between gross salary for remuneration purposes and for pension purposes.

VIII. The Applicants' challenge to the UNJSPB's decision in this case is, in reality, an exercise in semantics. It rests entirely on the "gross salary" label which appears in Annex I of the administrative circulars but ignores altogether Annex II and

paragraphs 5 and 13 of administrative circular No. 1700 (whose significance plainly carried over to administrative circular No. 1752). The Applicants, who obviously benefited from the ICSC recommended methodology in the form of salary increases and from the partial application to them of the non-pensionable component prevalent in the area, would nevertheless have the Tribunal disregard the evident purpose of the circulars, i.e. to explain the difference between gross salary for pay purposes and gross salary for pension purposes.

IX. Were the Tribunal to sustain the Applicants' selective reference to Annex I as the definitive description of gross salary for the purposes of article 54(a) of the Pension Fund Regulations, it would nullify the ICSC recommendation lawfully adopted by UNESCO and provide an unjust windfall benefit to the Applicants.

X. The Tribunal finds that none of the Applicants could have been misled as to the correct amount of their pensionable remuneration and the explanation therefor. In view of the generous nature of the ICSC methodology adopted by UNESCO, none of the Applicants was injured in any fashion by the pension calculation on the basis of administrative circulars Nos. 1700 and 1752. The Tribunal holds therefore, that, read in their entirety and in context, administrative circulars Nos. 1700 and 1752 established gross salary scales as shown in Annex II for the General Service category, in keeping with the ICSC recommendation adopted by UNESCO. The Fund properly accepted those scales as pensionable remuneration for the calculation of the Applicants' pensions, under article 54(a) of the Pension Fund Regulations.

XI. In view of the Standing Committee's affirmation "that your appeal involved complex legal issues that were important and merited adjudication by the United Nations Administrative Tribunal" the Tribunal finds that the Applicants were thus encouraged to submit the appeals that are now before the Tribunal. This being the case,

it is appropriate that there be an award for costs. Accordingly, the Tribunal orders the Respondent to reimburse the Applicants, in the amount of US$4,500 in total, for the collective costs with respect to this case.

XII. For the foregoing reasons, and except as provided in paragraph XI above, the applications are rejected, as are the individual requests for costs.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Hubert THIERRY
Member

Mayer GABAY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary